Filed 10/7/04 In re K.S. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re K.S., a Person Coming Under the Juvenile Court Law.	B173034 (Los Angeles County Super. Ct. No. CK46108)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Sherri S. Sobel, Juvenile Court Referee. Affirmed.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Larry Cory, Assistant County Counsel and Kristine Miles, Senior Deputy County Counsel, for Plaintiff and Respondent.

Appellant A.M. (mother) contends that we must reverse the order terminating her parental rights to K.S. (the minor) because the juvenile court applied the wrong burden of proof and required her to prove the beneficial relationship exception in Welfare and Institutions Code section 366.26, subdivision (c)(1)[1] by "compelling evidence" instead of by a preponderance of the evidence. Though we agree that the trial court erred by applying a heightened burden of proof, the error was harmless. The record reflects that the juvenile court would have ruled the same no matter the burden. Alternatively, mother argues that the juvenile court's factual findings were not supported by substantial evidence. Because this theory also fails, we affirm.

FACTS

Mother met T.S. (father) and they had a child together, the minor. Soon after, father was arrested for child molestation. Between his two stints in prison, mother and father got married. After father was incarcerated a second time, mother began dating R.S. By July 2002, mother, the minor and R.S. were homeless. The minor was detained after police officers observed him sitting on the lap of R.S. At the time, R.S. was in

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1 In relevant part, section 366.26, subdivision (c)(1) provides: "If the court determines . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . A finding . . . that reunification services shall not be offered, . . . that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months or that the parent has been convicted of a felony indicating parental unfitness, or, . . . that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

possession of drug paraphernalia, naked from the waist down and reading a pornographic magazine.

The minor was impulsive, lacked training and manners, and displayed a tendency to talk to strangers. Also, the minor exhibited anxiety, nocturnal bedwetting, and poor physical boundaries. Some of his behavior was sexualized, he used inappropriate adult language to refer to female anatomy, and he was unusually sensitive about having his genitals washed. Because of his behavior and apparent trauma, he was referred to therapy.

Eventually the minor was placed with C.J. (foster mother). At the time of the placement, he was underweight and anemic. Under foster mother's care, he developed physically and emotionally and continued to go to therapy. His social skills grew and he performed well in school. After a while he became less impulsive, and his sexualized behavior waned.

The juvenile court ordered reunification services.

Mother had monitored visits with the minor and called him three or four times a week. He enjoyed her visits and looked forward to their time together. Nonetheless, early on, he told his therapist that he did not want to live with her if she moved in with a man.

For the most part, mother complied with the case plan. She obtained a job, moved into a shelter and completed various programs. However, she quit her Child Sexual Abuse Program (CSAP) while she was only in the first phase because she thought she was finished with her treatment.[2] There was evidence that she was in contact with father and planned to reunite.[3] At different times during the dependency process mother asked the Department of Children and Family Services (Department) to live scan two new men,

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[2] She eventually resumed CSAP, but was still only in the first phase.

[3] Father was incarcerated for molestation of a female under 12 years of age. His counselor informed the social worker that father had made progress but that it would be a risk for the minor to be with father.

J.R. and V.P. Mother even went so far as to inform the social worker that V.P. would be spending a lot of time with the minor.

The minor's therapist believed that mother's continued contact with father raised concerns about her apparent disregard for the alleged sexual abuse against the minor. Beyond that, the therapist opined that due to mother's past involvement with two child sex offenders, reuniting her with the minor would place him in a particularly vulnerable position. In the social worker's opinion, mother was not "forthcoming about the men with whom she spends her time and to whom [the minor] would be exposed if returned to her care. She is not and has not been in a long-term relationship with an individual whom [the Department] can be assured is not a safety risk to her child nor has she abstained from relationships with men, be it telephonic or otherwise, that have been proven to be a danger to children."

Both the Department and the minor's counsel requested that reunification services be terminated.

The juvenile court stated: "Mother has, in my opinion, at all times, put the welfare of the men in her life over the welfare of [the minor]. We know of at least two molesters, and as recently as September of last year, . . . mother was still in a position where she was talking to . . . father. . . . [¶] We have at least five men in her life in the 18 months since we've been involved in the case -- at least five -- and mother has petitioned the Department to make these men part of her son's life."

In the juvenile court's view, mother was unable to recognize and admit the problems that required the minor's removal. Moreover, she displayed a problem with boundaries and an inability to place the minor's needs in front of her own. This led the juvenile court to state: "There is no way I could return this child. . . . [¶] . . . I find her at the absolute highest risk 18 months after this case started, and the only reason the [minor] has not been reoffended . . . is luck. [¶] The [juvenile] court finds by . . . clear and convincing evidence . . . return would create a substantial risk of danger to the physical and emotional well-being of the [minor]. [¶] . . . [¶] Court-ordered reunification services are hereby terminated."

Before the section 366.26 hearing, foster mother reported the following: Mother would show up for visits with unkempt, strange men who appeared to be homeless. When mother and the minor greeted each other, they embraced inappropriately and attempted to kiss with tongues going toward open mouths. The minor would sometimes brush up against mother with his pelvis rotated toward her. Moreover, the social worker was concerned about the circle of friends that accompanied mother to hearings and her visitations with the minor. Mother was advised on several occasions that anyone who visited the minor with her had to be live scanned. However, the various members of mother's circle, except for V.P., had not been live scanned. It was noted that mother said that two of her friends would watch the minor once he was returned.

An expert was appointed to evaluate the parties.

After conducting interviews, the expert determined that the minor's trauma had not been resolved and that his relationship with foster mother was far healthier than his relationship with mother. The minor was used to mother coming and going, which suggested the lack of a secure attachment. Overall, he demonstrated a need to address his exposure to sexual experiences, his lack of boundaries regarding touching, and his fixation on body parts. Moreover, he was hyper-vigilant about his sexual identity and feared being identified as a girl.

During his one-on-one interview, the minor revealed that he had been locked in a bathroom by a man he called S. This was a name that did not appear in the case file. He said that S. hurt him. When asked if he had talked to mother about when he was hurt, he said no, that she would be embarrassed. In the conjoint session with mother, the expert asked who S. was. Mother shrugged, as though she did not know, and this appeared to greatly alarm the minor. At that point, the minor began whispering to mother, as though he was telling her secrets.

The expert assessed mother's relationship to the minor as follows. "[The minor] is highly protective of her and it is apparent that he did not want me to press the issue about the man named [S.]. His immediate shift to whispering is indicative of the secrets they hold. To the degree that [the minor] maintains the secret of his victimization to protect

his mother from conflict or from what he perceives as an emotional injury, he will delay his process. He did not confront her and colluded in maintaining the secret as an act of protectiveness towards her. He whispered the answers to her when defining a good secret from a bad secret to help her answer correctly. . . . [¶] To date, there has not been therapeutic intervention to alter the system they maintain. However, [mother] does not demonstrate readiness to address these issues as she tends to minimize [the minor's] peril. . . . Her pattern of minimizing [the convictions of father and R.S.] is a defense against their predatory behavior and defends against her association with them. In conjoint sessions, this would send a clear message to her son that his memories may be less distressing than he recalls and less emotionally painful than he has experienced. When I asked [mother] about the man he named as his captor, her inability to recall him both shocked and paralyzed [the minor]."

In contrast, the expert noted that the minor "formed a secure and meaningful attachment to [foster mother] and members of her family."

At the permanent plan hearing, the juvenile court noted that mother was never without a man and that the men in her life were more important to her than the minor. Instead of internalizing the danger to which she exposed the minor, she minimized and denied it. The juvenile court stated: "Here, I need to find by compelling evidence that there is an exception. Compelling evidence. I cannot do that. I believe that [mother] poses as much a risk today as she did the day [the minor] was removed. [¶] . . . [¶] . . . [H]er current relationship with the [minor] remains an unhealthy one. . . . [¶] The court finds by clear and convincing evidence that [the minor] is adoptable, and there are no exceptions."

This timely appeal followed.

DISCUSSION

Mother proceeds on two fronts. She first argues that prejudicial error occurred when the juvenile court relied upon a "compelling evidence" burden of proof for purposes of section 366.26, subdivision (c)(1)(A). Alternatively, mother insists that the juvenile court's factual findings were not supported by substantial evidence. Upon review, neither contention has merit.

I.

The juvenile court erred when selecting a burden of proof

By selecting a compelling evidence burden of proof, the juvenile court made a legal determination that does not bind the appellate court. (*Masonite Corp. v. Superior Court* (1994) 25 Cal.App.4th 1045, 1050.) As a result, in analyzing the applicable law, we exercise "de novo" review, approach the issue from a clean slate, and independently reach our own conclusion. (*McMillin-BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 554.)

Both parties agree that section 366.26, subdivision (c)(1)(A) burdens the parent with the task of persuasion. The next question is whether that burden requires a preponderance of the evidence or compelling evidence. According to mother, the former burden applies. We agree. (See *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295 ["The party claiming an exception to adoption has the burden of proof to establish by a preponderance of evidence that the exception applies"].) For its part, the Department concedes this issue sub silentio.

The juvenile court erred when it required mother to prove an exception by compelling evidence.

In a futile effort to defend the order under review, the Department argues that the juvenile court was "simply following the language of the code which requires the [juvenile] court to find a 'compelling reason' for determining that termination of parental rights would be detrimental due to one of the exceptions listed in section 366.26, subdivision (c)(1)(A)-(E)." The Department's position is revisionist history which we reject. The juvenile court unequivocally required mother to show compelling evidence, not a compelling reason.

II.

The juvenile court's error is subject to harmless error analysis

Mother contends that we must reverse and remand for a new hearing any time a juvenile court misstates the burden of proof. She cites *In re Katrina C.* (1988) 201 Cal.App.3d 540, 550 (*Katrina C.*).

In *Katrina C.*, the father argued that the juvenile court erred by not articulating the burden of proof it was applying at a disposition hearing. (*Katrina C.*, *supra*, 201 Cal.App.3d at p. 547.) Under the particular facts of the case, and due to ambiguities and recent changes in the law, the court agreed. (*Id*. at pp. 548-550.) The court held that a clear and convincing standard applied and then stated: "We do not feel a full reversal of these proceedings is required. Instead, we remand so the juvenile court may articulate which standard of proof it applied at the disposition hearing. If it in fact applied the 'clear and convincing' standard, the disposition order may stand. If, on the other hand, it applied the lesser 'preponderance of the evidence' standard, only then is a new disposition hearing required." (*Id*. at p. 550.)

The problem with *Katrina C.* is that it does not clearly state that reversal is mandatory if the wrong burden of proof is applied. Moreover, a case it relied on -- *In re Bernadette C.* (1982) 127 Cal.App.3d 618 (*Bernadette C.*) -- analyzed this issue to determine if the error was harmless. (*Bernadette C.*, *supra*, at p. 625 ["Under the factual setting of this case, we cannot conclude that the error applying the wrong standard of proof was harmless"].)

In our view, *Bernadette C.* is the better case because it implicitly recognizes the following law. Our Constitution permits reversal only if an error results in a "miscarriage of justice." (Cal. Const., art. VI, § 13.) A "miscarriage of justice" exists when the appellate court, after reviewing the entire record, is of the opinion that """it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."""" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) Similarly, Code of Civil Procedure section 475 provides that courts must disregard any error "which . . . does not affect the substantial rights of the parties" and that no appealed order shall be " reversed . . . by reason of any error" unless the record demonstrates that the error was "prejudicial" and caused "substantial injury," and "a different result would have been probable" absent the error.

III.

The error was harmless

Mother focuses on the fact that the juvenile court erroneously required her to provide compelling evidence of the beneficial relationship exception. However, she ignores the juvenile court's statement that there was clear and convincing evidence that no exception existed. In other words, the juvenile court ruled that the evidence weighed so heavily against mother that she did not lose just by a preponderance of the evidence, she lost by an even greater margin. Therefore, the juvenile court's ruling would not have changed had it applied a lesser burden.

For mother to prevail, she had to demonstrate that her relationship with the minor promoted his well-being to such a degree as to outweigh the well-being he could gain by being placed with adoptive parents. "'In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' [Citation.] [¶] The parent must do more than demonstrate 'frequent and loving contact[,]' [citation] an emotional

bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a 'parental role' in the child's life. [Citations.] [A parent has] the burden of proving that [she] has developed . . . a significant, positive emotional attachment to [the minor]. [Citations.]" (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827 (*Derek W.*).)

A review of the hearings confirms that the juvenile court was of the opinion that mother posed a risk to the minor. According to the juvenile court: Mother placed the welfare of inappropriate men in her life over the welfare of the minor. She minimized and denied problems that led to the minor's removal. That the minor had not been victimized again was a matter of luck. Though mother was making life changes, she was only at the beginning of the process. For example, after 27 months, she was only in the first stage of her treatment with CSAP. All in all, mother posed as much of a risk now as she did before the detention. Not only that, mother's relationship with the minor continued to be unhealthy.

Given the juvenile court's view of mother and her relationship to the minor, it cannot be said that it is reasonably probable that a result more favorable to her would have been reached in the absence of the error.

IV.

The termination of parental right was supported by substantial evidence

When a juvenile court finds that a parent failed to establish the beneficial relationship exception, we review that finding for substantial evidence. (*Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) This rule, as has been oft noted, does not lead us to automatically affirm. As one court put it: "While, admittedly, we are to indulge in all reasonable inferences to support the findings of the juvenile court [citation], we must first find

evidence from which an inference can be made and, if that can be done, the inference must be reasonable and not based on surmise or speculation." (*In re James B.* (1991) 184 Cal.App.3d 524, 530.)

Mother informs us that she proved the exception and that the juvenile court's ruling was not supported by substantial evidence.

We disagree.

The positives cannot be denied. Mother participated in family outings with the foster family, saw the minor for eight hour monitored visits on Saturdays, called him three or four times a week and was reportedly supportive of his school activities. The minor told the social worker that he enjoyed mother's visits and looked forward to their time together. Additionally, one of mother's therapists referred to mother's dedication to minor and the reunification process as "remarkable" and opined that mother was "more than capable of parenting her child." But this is not enough. The relationship between mother and the minor may be significant, but "it bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship." (*Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) It was foster mother who provided the minor with his daily needs. She was the one with whom he formed a secure and trusting attachment.

Moreover, as the expert observed, the minor was used to mother coming and going, suggesting that he did not have a secure attachment to her. In fact, during his evaluation prior to the permanent plan hearing, the minor was asked about mother and he stated, "I forgot about her. . . . I like to play." Undeniably, the minor suffered separation anxiety right after he was detained. But there was no evidence that his suffering continued once he adjusted to life with foster mother. What the evidence illuminated was something else entirely. For example, there was evidence that mother did not set appropriate boundaries for the minor, such as when they attempted to kiss or hug in an inappropriate manner. Also, because she did not attend any of the minor's therapy sessions, it cannot be said that she took on a parental role with respect to his greatest need. Even if she had, there is an inference that her participation would have been detrimental. The expert believed that mother's secretive relationship with the minor

would delay his therapeutic process. Perhaps the system that the two of them maintained could be treated with intervention. But in the expert's opinion, mother did not demonstrate a readiness to take that step. There is an inference, then, that with respect to the most profound psychological challenge facing the minor, their relationship was negative rather than positive.

The juvenile court's order was supported by substantial evidence. We have no occasion to substitute our own judgment.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD